INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statement	3
Reasons for granting the writ	9
Conclusion	17

CITATIONS

Cases:	
Arkadelphia Milling Co. v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134	12
Baltimore & Ohio R.R. Co. v. *United States*, 279 U.S. 781	12, 14
Booth v. *American Tel. & Tel. Co.*, 253 F. 2d 57	13
Chander & Price Co. v. *Brandtjen & Kluge, Inc.* 296 U.S. 53	14
Columbus Gas Co. v. *American Fuel Co.*, 322 U.S. 379	14
Federal Power Commission v. *Interstate Gas Co.*, 336 U.S. 577	12
Inland Steel Co. v. *United States*, 306 U.S. 153	11, 12
Lincoln Gas Co., Ex parte, 256 U.S. 512	12, 14
Natural Gas Pipeline Co. v. *Federal Power Commission*, 128 F. 2d 481	12
Public Service Commission of Missouri v. *Brashear Freight Lines, Inc.*, 312 U.S. 621	12
Texas & Pac. Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426	13–14
United States v. *Morgan*, 307 U.S. 183	12, 16

716-546—63——1

Statute:
Communications Act of 1934, as amended, Secs. 201–205, 403 (47 U.S.C. 201), 205, 403 3
Miscellaneous:
Federal Rules of Civil Procedure, Rule 65(c) 11
21 Fed. Reg. 1614 3

In the Supreme Court of the United States

OCTOBER TERM, 1963

No.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

WILSON & COMPANY, INC., SWIFT & COMPANY, AND ARMOUR & COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review an interlocutory order of the Court of Appeals for the Seventh Circuit granting an injunction *pendente lite* in the above cause.

OPINION BELOW

The court of appeals filed no opinion. The order of the court granting the injunction is not reported; it and other related orders are printed in Appendices A to F, *infra*, pp. 19–22, 35–38, 41–42.

JURISDICTION

The interlocutory injunction order of the court of appeals was entered on September 27, 1963. Rehearing *en banc* was denied in an order dated November 12, 1963; in the latter order the court also declined to modify the injunction by attaching certain protective conditions thereto, as requested by the government. The jurisdiction of this Court is invoked under 5 U.S.C. 1040 and 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Federal Communications Commission entered orders revising common carrier tariff rates for private-line telegraph and telephone services. While some rates in each class of service were raised and some lowered, the net effect was to raise telegraph rates and to lower telephone rates. Review of the Commission's orders was sought in the court of appeals only by certain private-line telegraph customers objecting to the higher telegraph rates. The court below, to guard against injury to those customers in the event that the Commission's orders as to telegraph rates are ultimately reversed, stayed, *pendente lite*, the whole of the Commission's orders, including those provisions prescribing the lowered telephone rates (which have not been challenged).

The question presented is whether the court below failed in its responsibilities as a court of equity by refusing to condition its injunction so as also to protect from injury those members of the public who are being deprived by the stay of the benefit of the telephone rate reductions ordered by the Commission.

STATEMENT

On March 7, 1956, the Federal Communications Commission instituted an investigation, pursuant to Sections 201–205 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 201–205, 403, into the lawfulness of charges for private-line (leased facility) services contained in the tariffs of the American Telephone & Telegraph Company and associated telephone companies ("AT&T"), and the Western Union Telegraph Company ("Western Union") (21 Fed. Reg. 1614).[1]

Hearings were held (FCC Docket Nos. 11645 and 11646) during 1957, 1958, and 1959, and the record was closed on September 16, 1959. Prior to any decision on the matters at issue, the Commission, on June 25, 1958, ordered an interim reduction in AT&T's gross revenues from private-line telephone services of approximately $5,700,000 per annum, thereby reducing AT&T's rate of return on these services from about 11.4 percent to about 7.3 percent. The Commission concluded from its examination of AT&T's

[1] Private-line services consist of the furnishing of channels by the carrier for the transmission of communications between two or more locations specified by the lessee. The services provide the lessee with the means of continuous communication without the necessity for the carrier to establish connections for each individual call or message. Private-line services include various types of communication (*e.g.*, transmission of picture material, data transmission, remote meter reading). While the Commission's proceeding considered all the various types, the only services pertinent to the action in the court below are private-line telegraph and telephone services. Both AT&T and Western Union provide private-line telegraph services, but only AT&T provides private-line telephone services.

own cost evidence of record that its charges for private-line telephone services were unjust and unreasonable and should be reduced. (Ex. A7–8, B39.)[2] The reductions became effective on August 29, 1958. The Commission denied AT&T's petition to defer reduction of telephone rates until telegraph rates could be increased, holding that there was no reason to charge users of private-line telephone services unreasonably high charges pending a possible revision of rates for private-line telegraph services.[3]

Thereafter, both AT&T and Western Union filed tariffs providing for an interim increase in private-line telegraph rates. The Commission permitted the tariffs to go into effect on December 2, 1958, but ordered both carriers to keep accounts of the amounts collected thereunder so that the Commission, in its final decision, might order any refunds found to be warranted. As a result of these interim increases, the rate of return from telegraph services for each of the carriers was raised to approximately 5.9 percent. (Ex. A8, B40.)

On July 14, 1961, the Commission issued an initial decision prescribing rates for all telegraph and telephone private-line services (Ex. A2–A235). The Commission found that the level of AT&T's and Western Union's "pre-interim telegraph rates was unreason-

[2] "Ex." refers to the printed "Exhibits A, B, C, and D to Petition for Review" filed in the court below. This exhibit contains the initial and final decisions of the Commission, and its memorandum opinion and order in the above dockets.

[3] See Supplemental Brief of the United States and the Federal Communications Commission in opposition to application for interlocutory injunction (Supplemental Brief), p. 4.

ably low * * * [and] continues to be inadequate under the current interim rates." On the other hand, AT&T's private line telephone earnings were found to have been "unreasonably high." (Ex. A103.) Accordingly, the Commission concluded that revisions were necessary. Although some increases and some reductions of rates were prescribed within each of the two classes of services, the net effect was a further reduction in telephone rates of approximately $1.6 million per year, in terms of 1955 best-year volumes of business, and $5.2 million based on December 1962 volumes; and a further annual increase of approximately $2.7 million in telegraph rates, based on 1955 volumes, and $3 million, in terms of December 1962 figures (Ex. A106, A107; Supplemental Brief, Attachment 2).

In prescribing the above rates the Commission was guided by the carriers' cost of providing each service. It stated that "the cost of providing service constitutes the most reliable criterion available for determining just, reasonable and non-discriminatory rates" (Ex. A96). And it analyzed separately cost data for telephone and telegraph services (see Ex. A259–A262). The Commission also specifically ruled that rates for each service should be independently reasonable; it rejected the argument that some services should be offered at rates which would subsidize, or be subsidized by, rates for other services, observing that "care must be taken to avoid excessively high rates for a carrier's noncompetitive services * * * which tend to offset deficiencies resulting from unduly low rates for competitive services" (Ex. A104).

On October 16, 1961, petitioners below, Wilson & Co., Inc., Swift & Co., and Armour & Co. ("meat

packers"), filed a petition for leave to intervene in the proceedings before the Commission and submitted exceptions to the initial decision. The meat packers alleged that they leased a large number of telephone and telegraph circuits and that the rates prescribed in the initial decision would result in substantial increases in charges to them for private-line telegraph services. Their petition for leave to intervene was granted. (Supplemental Brief, p. 7.)

On January 30, 1963, the Commission issued a final decision substantially affirming its initial findings and conclusions as to the rates for both private-line telegraph and telephone services (Ex. B1–B37). Petitions for reconsideration were denied in a memorandum opinion and order issued on May 29, 1963 (Ex. C1–C11). The Commission's order required AT&T and Western Union to file tariffs, effective August 1, 1963, implementing the prescribed rates and to proceed forthwith to make refunds of such of the interim increased telegraph charges as were found unjustified (Ex. C10–C11).

In a joint petition for review filed with the Seventh Circuit, the meat packers urged (at p. 11) that the Commission's orders "be determined invalid and be set aside" insofar as they directed changes in rate structures applicable to "private line telegraph service."[4] Concurrently, they filed an application

[4] Illustrative of the limited scope of the meat packers' challenge is their designation as "[o]ne of the most significant changes in the rate structures for private line telegraph service" the Commission's abrogation of the carriers' practice of offering private-line telegraph services on the basis of "clock

for an interlocutory injunction staying the Commission's orders "so far as such orders prescribe the rates, to become effective August 1, 1963, for private line telegraph services" furnished by AT&T and Western Union. The application alleged that the Commission's orders would increase the meat packers' costs for telegraph services by $95,510 per year. A motion for a temporary stay was also filed.

The Commission opposed the requests. AT&T, an intervenor in the court below, filed an answer urging that the interlocutory injunction either be denied or, if granted, that it be applied to the Commission's orders in their entirety.

On July 31, 1963, the court granted the application for interlocutory injunction, stating that (App. A, *infra*, pp. 19, 20)—

> this interlocutory injunction be not limited to petitioners, but that it "apply generally to the orders in FCC Dockets Nos. 11645 and 11646."

Later the same day that order was vacated and replaced by an order temporarily staying the Commis-

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hour" rates (Petition, pp. 5–6). Those rates were offered to telegraph customers requiring less than 24-hour a day service, and payment thereunder was based upon the number of hours of each day and the number of days of each week the customer utilized such services (*id.* at 6–7). The Commission found that "clock hour" rates were not offered to telephone customers (Ex. A110), and that the carriers' cost for providing telegraph services was the same regardless of the number of hours any customer used the services. Therefore, the Commission concluded that "clock hour" rates were discriminatory and abolished them, with the result that the meat packers received substantial increases in their telegraph rates. (Ex. A111–A117, B27–B28.)

716-546—63——2

sion's orders "in their entirety" for 60 days (App. B, *infra,* pp. 21–22).

On August 16, 1963, the government moved for an order requiring AT&T to file a bond and to render an accounting (App. C, *infra,* pp. 23–32). The motion alleged that application of the stay to telephone rates (which had been generally lowered by the Commission's orders and which had not been challenged in the petition for review) would cause irreparable injury to the consuming public unless AT&T were required to account for and pay back excess charges collected during the pendency of the injunction. AT&T filed an opposition, urging that the rate reductions as to which the government was requesting a bond could not be separated from the other rate orders, and that if there was to be a resettlement it should not be limited to rates reduced by the Commission's orders. The government's motion was denied on September 4, 1963 (App. C, *infra,* p. 35). The proposal contained therein was later resubmitted to the court in a brief opposing the interlocutory injunction. The government submitted a draft order and stated in its Supplemental Brief (p. 2):

> In the event that the Commission's orders are * * * enjoined by the Court, in whole or in part, we respectfully invoke the Court's equitable power to condition any injunctive relief upon accounting by the carriers and refunds of any charges in excess of the rates prescribed by the Commission, if such rates are not found unlawful by the Court on review of the merits.

The court, on September 27, 1963, enjoined the Commission's orders in Docket Nos. 11645 and 11646 "in

their entirety". The interlocutory injunction contained none of the conditions requested by the government for the protection of the telephone users, nor did it articulate any basis for the court's refusal to attach such conditions. (App. D, *infra*, pp. 36–38.)

On October 18, 1963, the government sought leave to file an additional pleading. This proposal, with which AT&T and Western Union agreed in principle, was that the court enjoin only those rates which had been reduced by the Commission; the carriers were to be permitted to collect, *pendente lite*, either the rate fixed by the Commission or the rate in effect when the suit was brought, whichever was higher, subject to refund with interest if the ultimate resolution of the case so warranted.[5] This motion was denied on October 30, 1963 (App. E, *infra*, p. 41).

Previously, on October 7, 1963, the government had moved for rehearing *en banc* of the order granting the interlocutory injunction without protective conditions. The full court denied this motion on November 12, 1963, with Judge Duffy stating his independent "opinion" that "a bond should be required of [AT&T] in order to protect the public from any injury that might result from the injunction heretofore ordered by this Court" (App. F, *infra*, p. 42).

REASONS FOR GRANTING THE WRIT

This controversy arises out of an order by the Federal Communications Commission revising rates for

[5] AT&T orally advised the government that its agreement did not extend to refunding higher rates already collected as of that time, and the government's motion acceded to this modification of the proposal.

private-line telegraph and telephone services. The order found that the rates for telegraph services, where AT&T and Western Union were in competition, were unreasonably low, while the rates for the non-competitive telephone services of AT&T were excessive. The Commission accordingly prescribed increases in the former category and reductions in the latter. While that portion of the Commission's order which increased the telegraph rates was appealed by the meat packers, neither AT&T nor any other party sought review of the lower telephone rates prescribed by the Commission. At the request of the meat packers, the Seventh Circuit issued an injunction staying the administrative order *pendente lite*. At AT&T's request, that injunction was made applicable not only to the telegraph rates, which alone were in issue, but to the unchallenged telephone rates as well.

Having taken steps to safeguard the interests both of the meat packers and of the carrier, and having deprived telephone customers of the immediate benefit of rate reductions which had not even been attacked, the court was plainly under a duty to insure that those customers would not be irreparably injured as a consequence of the injunction. To that end, the court should have imposed upon AT&T, as a condition of granting it equitable relief, an explicit obligation to refund any charges ultimately found excessive and to maintain appropriate accounts to assure the prompt and convenient satisfaction of that obligation. It is the refusal of the court to impose those protective

conditions which we challenge in this petition. That refusal, we submit, was a serious abuse of discretion and a violation of fundamental principles of equity long recognized by this Court.

As a result of the course followed by the court below, some 4500 telephone customers are now paying rates which exceed by more than $5,000,000 the maximum lawful rates as determined by the Commission, without any assurance that the overcharges will be refunded to them. Since (1) the issue presented in this case is narrow and sharply defined, (2) the court's action violated well settled principles, and (3) the need for relief is immediate, we respectfully urge the Court to dispose of the merits without further briefing or oral argument.

1. Even in the ordinary case—*i.e.* the case in which no question arises as to the power of the court to stay the rates—the court which grants an injunction must be astute to "protect * * * other interests—represented by the Commission—from injuries that the injunction might cause." *Inland Steel Co.* v. *United States*, 306 U.S. 153, 157–158.[6] If it enjoins the agency order, it must "do so upon conditions that will protect all—including the public—whose interests the injunction may affect." *Id.* Specifically, if it stays the effec-

[6] Compare Rule 65(c) of the Federal Rules of Civil Procedure, which prohibits the issuance of a restraining order or preliminary injunction "except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

tiveness of a rate reduction, it must take steps which provide assurance that, if the agency's order is ultimately upheld, the parties will be placed "in the position in which they would have been had there not been a postponement of the effective date of the rate reduction * * *." *Federal Power Commission* v. *Interstate Gas Co.*, 336 U.S. 577, 586; *Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.*, 312 U.S. 621, 629; *United States* v. *Morgan*, 307 U.S. 183, 191, 197; *Inland Steel Co.* v. *United States*, 306 U.S. 153, 157; *Baltimore & Ohio R.R. Co.* v. *United States*, 279 U.S. 781, 785–786; *Ex parte Lincoln Gas Co.*, 256 U.S. 512, 517; *Arkadelphia Milling Co.* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134, 145, 146; *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481, 486 (C.A. 7). That precept is a corollary of "the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby. * * * It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process." *Arkadelphia Co.* v. *St. Louis S.W. R.R. Co.*, *supra*, at 145–146.

From these principles and decisions it plainly follows that if the lower telephone rates ordered by the Commission are ultimately upheld (or left unaffected) by the Seventh Circuit's decision on the merits, the telephone customers will at that time be entitled to

an order requiring restitution of the excessive amounts collected under color of the injunction. Moreover, since the court of appeals would be obligated to order restitution at the close of the case, it was equally under a duty to preserve the efficacy of that remedy by attaching protective conditions at the time of issuing the injunction. For in the absence of a provision requiring AT & T to keep appropriate records during the period of litigation, it is far from certain whether an accounting will later be feasible. We have no assurance that the records currently maintained by AT & T will enable it to compute retroactively the billings it would have made had the Commission's order not been stayed. The carrier itself, which plainly has the burden of proof in this matter, has given none. In sum, each day's delay in imposing record-keeping requirements progressively endangers the effectiveness of the restitution remedy.

Nothing in the statutory scheme under which the Commission operates casts doubt upon the right of restitution. Indeed, Section 207 of the Communications Act (47 U.S.C. 207) itself confers a right of reparation upon any person damaged by the unlawful conduct of a carrier subject to the Act. Under that provision, a telephone customer from whom the carrier collects rates already found by the Commission to be unlawful can undoubtedly recover the excess, either through judicial or administrative proceedings, once the Commission's determination has been affirmed on appeal. *Booth* v. *American Tel. & Tel. Co.*, 253 F. 2d 57, 58 (C.A. 7); cf. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204

U.S. 426. This statutory remedy, however, is not an adequate substitute for the automatic restitution which a court of equity must grant when an unlawful rate has been collected by virtue of its process. The telephone customers, having been required during the pendency of the appeal to pay presumptively excessive rates, should not also bear the onus of keeping records and initiating litigation. Here, moreover, as in other cases in which the court has sustained the right to equitable restitution, the "consumers [are] so many in number, and the difficulty of sustaining their individual claims through separate suits would be so great, that to remit them to such suits would be a virtual denial of justice." *Ex parte Lincoln Gas Co.*, 256 U.S. 512, 517; *Baltimore & Ohio R.R. Co.* v. *United States*, 279 U.S. 781, 786.

2. Here, even more than in the usual rate case, it was incumbent upon the court to adopt measures for the protection of the ratepayers. For in the instant case it is questionable whether the reduced telephone rates could properly be enjoined at all. The meat packers expressly confined their joint appeal to that portion of the Commission's order which established increased telegraph rates; and AT&T, which failed to seek review even on a protective or conditional basis, cannot, as an intervenor, enlarge the grounds for relief asserted by the appellants. *Columbus Gas Co.* v. *America Fuel Co.*, 322 U.S. 379; *Chandler & Price Co.* v. *Brandtjen & Kluge, Inc.*, 296 U.S. 53, 58.

This consideration apart, there is little likelihood that a resolution of the merits favorable to the meat

packers would provide any logical justification for an upward revision of the telephone rates. To be sure, AT & T, in urging that the Commission's order be stayed in its entirety, maintained that the telegraph and telephone charges were part of a single interdependent rate structure, and that the carrier ought not be limited to a reasonable return from telephone services unless it receives a statisfactory return from telegraph services as well. The Commission's order, however, flatly contradicts that view.

The Commission made it clear that the rate for each service must be based on the cost of rendering that particular service, *i.e.*, that the reasonableness of each charge must be determined independently. Indeed, the whole purpose of the revisions prescribed by the Commission was to assure that each separate service would earn a reasonable return and, as a consequence, that all services would earn roughly the same rate of return (7.3 percent). This approach was in sharp contrast to the carrier's existing (pre-interim) rate structure, in which deficient returns averaging 2.2 percent for various private-line telegraph services (Ex. A108) were compensated for, in AT&T's case, by unduly high rates averaging 11.5 percent (Ex. A102) for private-line telephone services. In rejecting the view, espoused by AT&T, that some services might be offered at rates which would subsidize or be subsidized by others, the Commission stressed that "care must be taken to avoid excessively high rates for a carrier's noncompetitive services * * * which tend to offset deficiencies resulting from unduly low rates for

competitive services" (Ex. A104). That basic rate-making principle was apparently not challenged in the meat packers' petition for review. For that matter, none of the grounds for relief set forth in that petition, even if accepted by the court, would call for an upward revision of the telephone rates.

On the other hand, in the course of passing on the validity of the telegraph rates, the court may deal with the propriety of the former disparities in rate of return between the telegraph and telephone services the argument, for example, that AT&T should have discretion to design its own rate structure so long as its overall rate of return is not excessive). Such a position, if adopted by the court, might conceivably lead to some increases in the Commission-prescribed telephone rates to offset decreases in the telegraph charges. Since that possibility, though remote, cannot altogether be discounted, we are reluctant to urge that it was an abuse of discretion to hold the telephone rates in abeyance pending the outcome of the appeal.[1] But surely if AT&T, as an intervenor, is to be afforded full protection against unlikely contingencies, the telephone rate payers should not be required to suffer more immediate con-

[1] There is also the possibility that, if the telegraph rates are set aside on grounds unrelated to the merits of the telephone rates, the court of appeals might nevertheless remand the entire rate order, including the telephone rates, to the Commission for reconsideration. Any remand, however, would not eliminate the telephone consumers' right to reimbursement for the period of judicial review, should the Commission's rate reductions ultimately be affirmed. *United States* v. *Morgan*, 307 U.S. 13, 195–198.

sequences—to pay presumptively excessive rates without even the assurance of such redress as would be provided by an explicit refund condition and the imposition of adequate accounting requirements.

CONCLUSION

This is a case in which relief must be expeditious if it is to be meaningful. So long as the injunction contains no record-keeping requirements, there is a likelihood that refunds will not be feasible even if the court of appeals should ultimately order them. Nearly five months have already elapsed since the reduced telephone rates fixed by the Commission were to have gone into effect. The charges found by the Commission to be excessive continue to accumulate at a rate of approximately $15,000 per day. It is evident that during the time required for further briefing and oral argument of the case large sums could be irretrievably lost to the rate-payers. We submit that the issue for decision is narrow and clear and that the action taken by the court below plainly requires correction. In these circumstances, the need for additional briefing and argument is minimal, while the need for expenditious relief apparent. Accordingly, we respectfully urge the Court to grant the petition for certiorari and reverse summarily the order of the

court of appeals denying the government's motion to modify the injunction.*

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DECEMBER 1963.

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* We do not urge that this Court need fashion the terms of protective conditions, but only that it direct the court of appeals to take appropriate measures to assure the prompt payment of refunds, together with interest, in the event that the amounts collected during the course of the judicial proceedings exceed the amounts ultimately determined to be lawful. And, in view of the lapse of time since the effective date of the Commission's order (August 1, 1963), the refund obligation should clearly be made retroactive to that date.

We also note that we are seeking an appropriate injunctive order from the Circuit Justice pending the action of this Court.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Ill.

No. 14269

WILSON & CO., INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., RESPONDENTS

Petition for review of an order of the Federal Communications Commission.

Wednesday, July 31, 1963

Before WIN C. KNOCH, and ROGER J. KILEY, Circuit Judges.

This cause came on to be heard upon the petitioners' application for interlocutory injunction restraining the enforcement of Federal Communication Commission orders in FCC Dockets Nos. 11645 and 11646 so far as such orders prescribe rates to be effective August 1, 1963 for private line telegraph services furnished petitioners by American Telephone and Telegraph Company and Western Union Telegraph Company pending disposition of petitioners' Joint Petition For Review of said orders; and upon petitioners' motion for temporary stay of said Commission orders pending disposition by this court of their application for said interlocutory injunction pending disposition of the said Joint Petition For Review; and upon motion of A.T. & T. and Bell System Com-

panies for oral argument on petitioners' said motion for temporary stay.

The court having read the pleadings of the several parties and being further fully advised, IT IS ORDERED: (1) Motion for oral argument on petitioners' motion for temporary stay is DENIED. (2) IT IS FURTHER ORDERED that petitioners' application for an interlocutory injunction "suspending and restraining the enforcement operation and execution" of the orders entered by the Commission so far as such orders prescribe rates to be effective August 1, 1963 for private line telegraph services furnished by A.T. & T. and Western Union be and IS HEREBY GRANTED; and that this interlocutory injunction be not limited to petitioners, but that it "apply generally to the orders in FCC Dockets Nos. 11645 and 11646."

It becomes unnecessary to pass upon the motion for temporary stay.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Ill.

No. 14269

WILSON & CO., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., RESPONDENTS

Petition for review of an order of the Federal Communications Commission.

Wednesday, July 31, 1963

Before WIN G. KNOCH, and ROGER J. KILEY, *Circuit Judges.*

This cause came on to be heard upon the petitioners' application for interlocutory injunction restraining the enforcement of Federal Communications Commission orders in FCC Dockets Nos. 11645 and 11646 so far as such orders prescribe rates to be effective August 1, 1963 for private line telegraph services furnished petitioners by American Telephone and Telegraph Company and Western Union Telegraph Company pending disposition of petitioners' Joint Petition For Review of said orders; and upon petitioners' motion for temporary stay of said Commission orders pending disposition by this court of their application for said interlocutory injunction pending

disposition of the said Joint Petition For Review; and upon motion of A.T. & T. and Bell System Companies for oral argument on petitioners' said motion for temporary stay.

The court having read the pleadings of the several parties and being further fully advised, IT IS ORDERED that the motion of A.T. & T. and Bell System Companies for oral argument is denied.

It appears to the court from the facts stated in the pleadings before it that irreparable damage would result to petitioners in additional charges for interstate private line telegraph services approximating $95,510.00 per year, and the court so finds for the purpose of this temporary stay,

IT IS THEREFORE ORDERED that petitioners' motion for a temporary stay of the effect of the operation of Federal Communication Commission's orders in FCC Dockets Nos. 11645 and 11646 be and it is hereby granted as to the orders in their entirety; and said orders of the Commission are stayed for sixty (60) days from this date pending the hearing on petitioners' application for an interlocutory injunction restraining the enforcement of said Commission orders, said hearing to be held within said sixty (60) days, at such time as this court will designate on due notice to the parties and to the Attorney General of the United States.

IT IS FURTHER ORDERED that the issues raised by petitioners' application for interlocutory injunction restraining operation of the Commission's said orders, pending review of the Joint Petition For Review, be and the same are hereby reserved to the hearing on the application for interlocutory injunction to be heard at the time to be set by this court.

IT IS FURTHER ORDERED that the order heretofore entered on this date in the above cause be, and the same is hereby vacated and set aside.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago, Ill.

Case No. 14269

WILSON & CO., INC., SWIFT & COMPANY, AND ARMOUR & COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

AERONAUTICAL RADIO, INC., WESTERN UNION TELEGRAPH COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND BELL SYSTEM ASSOCIATED COMPANIES, INTERVENORS

MOTION OF THE UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION FOR ORDER REQUIRING THE FILING OF A BOND AND ACCOUNTING BY THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND BELL SYSTEM ASSOCIATED COMPANIES

The United States of America and the Federal Communications Commission, respondents herein, respectfully move the Court for an order requiring the American Telephone and Telegraph Company and Bell System Associated Companies (AT&T) to execute and file with the Clerk of this Court their joint and several bond with good and sufficient surety, in the principal amount of $1,000,000, in a form to be approved by a Judge or the Clerk of this Court, ac-

knowledging themselves bound and agreeing to keep accurate accounts, in detail, for each billing period since August 1, 1963, of all amounts received from each user of private line services, other than telegraph grade services, by reason of the Court's order of July 31, 1963, staying the effectiveness of the Commission's orders in Docket Nos. 11645 and 11646, and to report the same to the Clerk of this Court monthly in writing and under oath, with a copy of said report to the Commission; and further agreeing to refund to the users of private line services, other than telegraph grade services, any portion of the revenues collected by virtue of the Stay which are in excess of the rates for such services prescribed by the Commission's orders to be effective from August 1, 1963, in the event that the Commission's orders prescribing rates for such services are not set aside by this Court, such portion, if any, so refunded to be with interest at the rate of six per centum (6%) per annum from the date of payment to AT&T, and further agreeing to bear the costs of such refunding. The grounds for this motion are as follows:

1. By order dated July 31, 1963, the Court not only granted petitioners' motion for a temporary stay of the effect of the operation of the Commission's orders in FCC Docket Nos. 11645 and 11646 so far as such orders prescribed rates to be effective August 1, 1963, for private line telegraph services furnished petitioners by AT&T and Western Union Telegraph Company pending disposition by this Court of petitioners' application for interlocutory injunction, but also stayed the Commission's orders in Docket Nos. 11645 and 11646 in their entirety for sixty (60) days from the date of the Court's order pending hearing on petitioners' application for interlocutory injunction.

Thereafter, the United States and the Commission filed an emergency motion, dated August 2, 1963, requesting the Court to modify its stay order of July 31, 1963, so as to make the temporary stay applicable only to those portions of the Commission's orders in Docket Nos. 11645 and 11646 which prescribe rates for private line telegraph services, and to permit those portions of the Commission's orders which apply to other private line services to become effective immediately. By order dated August 13, 1963, the Court denied the Government's motion.

2. As grounds for the relief requested in the Government's motion, it was alleged in part, with supporting affidavits, that the extension of the temporary stay, beyond the relief sought by petitioners as to private line telegraph services, to affect also those portions of the Commission's orders applicable to private line services other than telegraph grade service, would cause irreparable injury to the public and the users of such services, since the Commission's orders in Docket Nos. 11645 and 11646 prescribed substantial rate reductions in the preponderance of such services, to be effective August 1, 1963. The motion further asserted (Emergency Motion, p. 8) that there was no statutory provision for restitution to these users and the public for the losses which would be incurred by them if the Court's order of July 31, 1963 was not modified as the Government respectfully requested, and that protection of these users could only be fully assured through the exercise of the equity powers of the Court.

3. By its "Supporting Motion for Modification of Temporary Stay Order," intervenor Aeronautical Radio, Inc., alleged irreparable losses to it and each of its member airlines using private line services other

than telegraph grade service, which could not be estimated precisely but which were asserted to be substantial, in the event that the temporary stay was not modified to affect only the rates prescribed for private line telegraph service.

4. "Petitioners' Reply to Motions for Modification of the Temporary Stay," did not either support or object to the Government's motion. However, petitioners alleged (Reply, p. 3, fn. 3) that they would stand to benefit from a grant of that motion since they lease 18 telephone circuits from AT&T and the reduced rates prescribed by the Commission would result in a reduction in annual charges to petitioners of almost $7,500.

5. The "Response of the American Telephone and Telegraph Company and Bell System Associated Companies in Opposition to the 'Emergency Motion' by the United States and the Federal Communications Commission for Modification of Temporary Stay," estimates that the net annual reduction in its revenues from private line telephone grade rates, had the Commission's orders been permitted to become effective, would have exceeded $1,034,000 per year on the basis of 1955 test period figures (Response of AT&T, p. 8). AT&T's Response further asserts (p. 8) that since the test period, changes have occurred which substantially increase this estimated amount. Moreover, since the $1,034,000 net figure reflects all private line telephone grade rates, including private line telephotograph service where increased rates were prescribed (Exhibit B to Joint Petition for Review, p. B-39), the loss to the users of private line telephone services is substantially greater than the net effect on AT&T's revenues from telephone grade services. This increased loss is apart from the fact that current losses would substantially exceed losses based on the test

period figures. Accordingly, while we believe that the amount of the loss to the users may be greater than that estimated by AT&T, the admitted annual loss will be substantially in excess of $1,000,000, and the loss during the 60 day stay period will substantially exceed one-sixth of that amount. Under the circumstances, we submit that a bond of $1,000,000 would be sufficient to assure performance by AT&T in the event that refunds are ultimately required, and would afford full protection to the users.

6. The Response of AT&T, to which the Government has not previously had an opportunity to reply, urges in addition that the Commission's orders in Dockets Nos. 11645 and 11646 prescribe a single rate structure for private line telegraph and telephone grade services, which is not properly severable and which should not be stayed in part. (Response of AT&T, pp. 3-7). Although this is the position of AT&T, the Government's position is to the contrary. As set forth in that portion of the Commission's decision quoted on p. 4 of AT&T's Response, the rates of return to AT&T from telephone grade service and telegraph grade service have previously been different and have varied as to services within each of the two grades. Thus, AT&T has in general charged rates which would afford it a higher rate of return with respect to telephone grade services, where it holds a monopoly position, and has charged lower rates (affording a rate of return as low as 1.6% for local channel telegraph service) for telegraph grade services, where it competes with Western Union Telegraph Company. The new rates prescribed by the Commission (AT&T Response, p. 5) will afford AT&T rates of return that vary somewhat from service to service. The telephone rates reflect the

Commission's view that AT&T's earnings from these services have been unreasonably high, and that a reduction to approximately 7.3% would be reasonable. With respect to telegraph grade services, the Commission has endeavored to prescribe rates which will afford Western Union, as well as AT&T, a fair rate of return and has already rejected AT&T's apparent view that private line telephone users should subsidize private line telegraph rates (34 FCC 244, 300, par. 149).

Thus, should petitioners prevail on the merits of their contentions that the telegraph rate structure was adopted without prior notice to them, that the Commission erroneously failed to provide for part-time private line telegraph services, and that special and preferential treatment was afforded news agencies, a remand to the Commission would not disturb the private line telephone grade rates (Petition for Review, pp. 9–11). Even if the Court were to determine that the 1955 cost study was out of date and that telegraph rates based on current figures were required (See "Petitioners Reply to Motions for Modification of the Temporary Stay", pp. 1–2), no alteration of telephone rates would follow. For, while the Commission's decision concluded that a rate of return of approximately 7.3% is reasonable in the telegraph field, it is conceivable that it might conclude upon the basis of current figures that a lesser rate of return would be reasonable. However, it is unlikely that the Commission would alter its conclusion that a rate of return for telephone grade services higher than approximately 7.3% is unreasonable, or change the rates prescribed in the telephone field.

Moreover, notwithstanding AT&T's assertion (Response, pp. 15–16) that the telephone portions of the Commission's order are before the Court for review.

it is our contention that the Commission's Decision of January 28, 1963 in Docket Nos. 11645 and 11646 has become final and non-reviewable in this respect. Petitioners concede (Reply to Motions for Modification of the Temporary Stay, pp. 1–2), that their Petition for Review is "limited in scope to a review of only that portion of the FCC orders dealing with rates for telegraph-grade private line services." We shall urge on the merits that an intervenor may not enlarge the grounds for relief of a petition for review pursuant to Section 4 of the Judicial Review Act of 1950, 5 U.S.C. 1034, merely by filing an appearance by their attorneys in the Court or a notice of intention to intervene. If AT&T was aggrieved by the telephone portions of the Commission's orders or desired to challenge the Commission's decision on grounds other than those stated by petitioners, its remedy was to file a timely petition for review which would apprise the United States and the Commission of the nature of its complaint.

Therefore, should petitioners prevail on the merits of their petition for review and should the Government prevail on either of the foregoing contentions, the Court's action would in no way affect the lawfulness of the prescribed telephone rates. See also, *Socony Mobil Oil Company* v. *Brooklyn Union Gas Company*, 299 F. 2d 692, 695 (C.A. 5), certiorari denied 371 U.S. 887; *Humble Oil & Refining Co.* v. *Great Northern Railway Co.*, 212 F. Supp. 747, 755 (D.C.D. Mont.). And, in the event that the new telephone rates prescribed by the Commission are ultimately determined to be unlawful, AT&T would not be required to refund by a grant of this motion:

7. If there is no statutory provision for reparation to the telephone users, in the event that the Government prevails on the merits of the Petition for Review

or on either of these contentions, the end result when the stay expires may be that the telephone rates prescribed in the tariffs filed by AT&T, to be effective August 1, 1963, were the lawful rates for this period. Possibly the interstate users of private line telephone services could then sue to recover the excess collected by AT&T after August 1, 1963. But since the interstate and intrastate users of private line telephone services provided by AT&T number approximately 150,000 (Emergency Motion, Attachment C) and since a large number of these users are undoubtedly interstate, we believe that equity requires that AT&T, rather than the injured users, keep detailed accounts and bear the burden and cost of refunding the excess collected pursuant to the stay order it requested. Certainly, AT&T is in the best position to do so.

8. As this Court has well stated in *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481, where a $1,000,000 bond was required as a condition of a stay of reduced rates, (485):

> This ancillary power to do complete justice as to all the parties' interests in a fund grows out of equity jurisdiction. When invoked we can conceive of no method by which it properly may be evaded. Thus the Supreme Court, discussing the jurisdiction of a statutory district court of three judges which had enjoined an order of the Interstate Commerce Commission, referring to the duty of the court to protect the impounded fund and direct its disposition, in *Inland Steel Co.* v. *United States*, 306 U.S. 153, 59 S. Ct. 415, 417, 83 L. Ed. 557, said: "It is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect. * * * When the Court finally determined that the administrative findings and order were correct, appellant could

> claim an interest in the fund only by asserting a right to payments forbidden by law, and it became the duty of the Court promptly to allocate the fund to its lawful owner."

The Supreme Court has similarly recognized in *Federal Power Commission* v. *Interstate Gas Co.*, 336 U.S. 577, 582, that:

> When a federal court of equity grants relief by way of injunction it has a responsibility to protect all the interests whom its injunction may affect. *Inland Steel Co.* v. *United States*, 306 U.S. 153. It assumes the duty to make disposition of the fund in accord with equitable principles. *United States* v. *Morgan*, *supra*, at 191. If in a particular case the court reaches the question of reasonableness of rates, it does so only for purposes of distributing the fund for whose creation it alone was responsible. It does not fix or prescribe rates for the past or the future. The reasonableness of rates charged by the companies who claim the fund is wholly ancillary to the problem of determining what claimants are equitably entitled to share in it. See *Atlantic Coast Line R. Co.* v. *Florida*, 295 U.S. 301; *United States* v. *Morgan*, *supra*.

See also, *United States* v. *Morgan*, 307 U.S. 183, 193–195 (where a stay order had required the payment of a fund into the Court for refunds of excess charges); *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 129 F. 2d 515 (C.A. 7) (requiring interest); *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 131 F. 2d 137 (C.A. 7); Stay Order entered by this Court on August 30, 1940 in *Illinois Commerce Commission* v. *Natural Gas Pipeline Company of America, et al.* (No. 7439), requiring a bond of $1,000,000; *Northern Natural Gas Co.* v. *Federal Power Commission*, 245 F. 2d 447 (C.A. 8) (where a stay order dated

November 18, 1955 required a bond and an accounting for refunds of excess charges with interest);[1]

9. While a grant of this motion would fully protect the users of private line telephone services encompassed within the Court's stay order of July 31, 1963 from losses incurred since August 1, 1963, we respectfully request expeditious consideration by the Court. AT&T and other carriers have tendered to the Commission comparable tariffs for other services, which are not affected by the Court's order but which the carriers claim should be coordinated. At the present time, the rates charged for such services may vary from carrier to carrier. Accordingly, an early ruling by the Court on this motion would materially assist the Commission's efforts to effectuate the public interest in these separate, but related areas.

WHEREFORE, it is respectfully requested that this motion be granted.

Respectfully submitted.

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AUGUST 16, 1963.

[1] The relief requested in this motion is patterned after an order entered December 18, 1952, by the Eighth Circuit in *State Corporation Commission of the State of Kansas* v. *Federal Power Commission*, (Case Nos. 14704, 14708, and 14733, C.A. 8).

CERTIFICATE OF SERVICE

I, Herman I. Branse, hereby certify that on this 16th day of August, 1963, I mailed true copies of the foregoing "Motion of the United States of America and the Federal Communications Commission for Order Requiring the Filing of a Bond and Accounting by the American Telephone and Telegraph Company and Bell System Associated Companies" to the following:

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Ill.

No. 14269

WILSON & CO. INC., SWIFT & COMPANY, AND ARMOUR & CO., PETITIONERS

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

AERONAUTICAL RADIO, INC., WESTERN UNION TELEGRAPH COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND BELL SYSTEM ASSOCIATED COMPANIES, INTERVENORS

September 4, 1963

Before ROGER J. KILEY, *Circuit Judge.*

This cause came on to be heard on the Motion of the United States of America and the Federal Communications Commission for order requiring the filing of a bond and accounting by the American Telephone and Telegraph Company and Bell System Associated Companies, and response of American Telephone and Telegraph Company and Bell System Associated Companies in opposition to the motion; and the court having considered the motion and response:

IT IS ORDERED that the motion be and it is hereby denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Ill.

No. 14269

WILSON & CO., INC., ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
RESPONDENTS

Petition for review of an order of the Federal Communications Commission.

Friday, September 27, 1963

Before WIN G. KNOCH, ROGER J. KILEY, LUTHER M. SWYGERT, *Circuit Judges.*

This cause came on to be heard (i) upon petitioners' application for an interlocutory injunction restraining the enforcement of orders issued by Federal Communications Commission in F.C.C. Dockets Nos. 11645 and 11646 so far as such orders prescribe rates to be effective August 1, 1963, for private line telegraph services furnished by American Telephone & Telegraph Company and Western Union Telegraph Company pending disposition of Petitioners' Joint

Petition for Review of said orders; (ii) upon the order of this Court entered herein on July 31, 1963, after due notice and on petitioners' motion and after finding on evidence submitted irreparable damage would result to petitioners, staying the effect of said orders in their entirety for sixty (60) days pending a hearing on petitioners' application for an interlocutory injunction; and (iii) upon the request of Federal Communications Commission and the United States of America for oral argument upon said application, which motion for oral argument was granted by the Court and held, after due notice to all parties, on September 26, 1963, at which time counsel for petitioners, for respondents Federal Communications Commission and the United States of America and for intervenors American Telephone & Telegraph Company and Western Union Telegraph Company, appeared and presented argument respecting said application for injunction.

The Court, after hearing and having considered the pleadings, briefs and motions of the several parties, including the evidence submitted respecting the effects of said Commission orders, an interlocutory injunction and alternative suggestions for relief submitted by respondents and intervenors and having heard oral argument and being further fully advised, is of the opinion and finds that, if enforcement of said orders is not restrained, irreparable damage would result to petitioners by way of imposition of additional charges for interstate private line telegraph services approximating $95,510.00 per year.

The Court further finds that the granting of said application for interlocutory injunction without restraining the enforcement of said Commission orders in their entirety, would work irreparable damage to

numerous others, including carriers and other customers.

IT IS THEREFORE ORDERED that petitioners' application for an interlocutory injunction staying and suspending the effectiveness with respect to petitioners of the Federal Communications Commission orders in F.C.C. Dockets Nos. 11645 and 11646 be and is hereby granted pending final hearing and determination of the Joint Petition for Review.

IT IS FURTHER ORDERED that said orders of the Commission be and are hereby suspended and the enforcement, operation or execution of said orders be and is hereby restrained in their entirety pending final hearing and determination of the Joint Petition for Review.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Ill.

Case No. 14269

WILSON & CO., INC., SWIFT & COMPANY, AND ARMOUR & COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

AERONAUTICAL RADIO, INC., WESTERN UNION COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY AND BELL SYSTEM ASSOCIATED COMPANIES, INTERVENORS

MOTION FOR LEAVE TO FILE ADDITIONAL PLEADING

The United States of America and the Federal Communications Commission, respondents herein, respectfully move the Court for leave to file the attached Additional Pleading of Respondents.

The ground of this motion is that respondents wish to propose to the Court and the other parties a suggested solution to the pending dispute concerning interlocutory relief which has not been proposed before, and which we believe will protect all parties to this proceeding as well as all other persons with an interest in the Commission's Order.

We regret the necessity for filing this additional motion. However, we believe it to be warranted by

the public interest considerations involved, and by the fact that for the first time there appears to be substantial agreement with both of the carriers.

Respectfully submitted.

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OCTOBER 18, 1963.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Ill.

No. 14269

WILSON & CO., INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
RESPONDENTS

Petition for review of an order of the Federal Communications Commission

Wednesday, October 30, 1963

Before WIN G. KNOCH and ROGER J. KILEY, *Circuit Judges.*

This matter comes before the Court on the motion of United States of America and Federal Communications Commission for leave to file additional pleading, and petitioners' reply to said motion, and the Court being fully advised in the premises,

IT IS ORDERED that the said motion be, and it is hereby denied.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Ill.

No. 14269

WILSON & CO., INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
RESPONDENTS

Petition for review of an order of the Federal Communications Commission

Tuesday, November 12, 1963

Before JOHN S. HASTINGS, Chief Judge; F. RYAN DUFFY, ELMER J. SCHNACKENBERG, WIN G. KNOCH, LATHAM CASTLE, ROGER J. KILEY, and LUTHER M. SWYGERT, Circuit Judges.

This matter comes before the Court sitting en banc on the motion of the United States of America and the Federal Communications Commission for rehearing en banc, for modification of injunction, or a stay of injunction, filed herein on October 9, 1963; the petitioners' reply to the motion of the United States of America and the Federal Communications Commission for rehearing en banc, etc.; and the response of the American Telephone and Telegraph Company and Bell System Associated Companies in opposition to the motion of the United States and the Federal Communications Commission for rehearing en banc,

for modification of injunction, or a stay of injunction; and all of the active members of this Court excepting Judge Schnackenberg, who disqualified himself, having considered the said motion, reply and response, and being fully advised in the premises,

IT IS HEREBY ORDERED that the said motion filed on October 9, 1953, be, and the same is hereby denied.

(Judge Duffy is of the opinion that a bond should be required of American Telephone and Telegraph Company in order to protect the public from any injury that might result from the injunction heretofore ordered by this Court.)

(Judge Schnackenberg disqualified himself.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 711

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

vs.

WILSON & CO., INC., SWIFT & COMPANY and ARMOUR AND COMPANY

COMMENTS OF WILSON & CO., INC., et al.

Re: PETITION OF UNITED STATES OF AMERICA, et al., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 711

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

vs.

WILSON & CO., INC., SWIFT & COMPANY and ARMOUR AND COMPANY

COMMENTS OF WILSON & CO., INC., et al.

Re: PETITION OF UNITED STATES OF AMERICA, et al., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Wilson & Co., Inc., Swift & Company and Armour and Company (the "meatpackers") submit this memorandum principally (i) to clarify for the Court, and to correct any misconceptions arising from the Petition for Writ of Certiorari, the scope of the appeal brought by them in the United States Court of Appeals for the Seventh Circuit from the orders entered by the Federal Communications Commission ("F.C.C.") in F.C.C. Docket Nos. 11645 and 11646 and (ii) to request that the application for writ of certiorari and any action with respect thereto not be permitted to delay the proceeding in the Seventh Circuit.

The Petition for Writ of Certiorari, which seeks a modification of the injunction order entered by the Court of

Appeals, is predicated in part upon the premise that the Petition for Review filed in the Seventh Circuit is limited in scope to a review of only that portion of the F.C.C. orders which deal with rates for telegraph-grade private line services. As the meatpackers have heretofore advised the Seventh Circuit,[1] this premise is true with respect to the relief requested in the Petition for Review. However, it is important to distinguish between the scope of the appeal and the prayer of the petition. While the meatpackers have limited their complaint solely to the charges prescribed for telegraph-grade service, they have done so upon grounds which challenge the validity of the F.C.C. orders in their entirety.

For example, without enumeration of each of the grounds for the appeal, the meatpackers have alleged and argued at length in their opening brief, which was filed in the Seventh Circuit on December 23, 1963, that the 1955 cost study was out of date, hypothetical and contrary to the weight of the evidence. If this argument is sustained, the reduction in rates for telephone-grade services cannot stand, because such reductions are based upon the same 1955 cost study.

Recognizing that the scope of the appeal would reach not only charges for telegraph-grade services but rates for telephone-grade services as well, the meatpackers are taking the position, as they did in the Seventh Circuit, of not objecting to AT&T's position that the injunction should apply to the F.C.C. orders in their entirety. This position was taken and is now taken even though the meatpackers, as subscribers to telephone-grade private line services, would be entitled to a reduction in charges therefor because

[1] Petitioners' Reply to Motions for Modification of the Temporary Stay, filed August 12, 1963, p. 2.

the meatpackers do not wish to seem inconsistent in claiming that allocations of costs between telephone-grade and telegraph-grade services were proper for one purpose but improper for the other.

Accordingly, the meatpackers do not either support or object to the Petition for Writ of Certiorari. However, it is earnestly requested that the application for a writ of certiorari and any action with respect thereto shall not be permitted to delay or in any way interfere with the prosecution on the merits of the proceeding in the Seventh Circuit.

Respectfully submitted,

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January 22, 1964

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No. 711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, et al., *Petitioners*,

v.

WILSON & CO., INC., et al., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND BELL SYSTEM ASSOCIATED COMPANIES IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

	PAGE
Jurisdiction	1
Question Presented	1
Statement	2
Reasons For Denying The Writ	10
I. The Petition Seeks Premature And Unnecessary Review By This Court	10
A. The Court Of Appeals Properly Deferred Decision Of Issues Respecting Restitution	10
B. Since Adequate Records Are Being Kept, There Is No Threat To Any Rights Of Rate Payers	13
II. Error By The Court Of Appeals, Even If Shown, Would Not Warrant Review By This Court	17
III. The Petition Is Out Of Time	18
Conclusion	20
Appendix A	21
Appendix B	31

CITATIONS

Cases

American Construction Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U.S. 372 (1893)	17
Baltimore & O. R. Co. v. United States, 279 U.S. 781 (1929)	13
Department of Banking v. Pink, 317 U.S. 264 (1942)	19
Leishman v. Associated Wholesale Electric Co., 318 U.S. 203 (1943)	19
United States v. Beatty, 232 U.S. 463 (1914)	17

Statute

Judicial Review Act of 1950, § 10, 64 Stat. 1132, 5 U.S.C. § 1040	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 711

UNITED STATES OF AMERICA, et al., *Petitioners*,

v.

WILSON & CO., INC., et al., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND BELL SYSTEM ASSOCIATED COMPANIES IN OPPOSITION TO PETITION FOR CERTIORARI

Jurisdiction

The jurisdictional requirements of the Petition for Writ of Certiorari are set forth in the Petition.[1]

Question Presented

Whether the Court of Appeals, having been assured that adequate records were being maintained and preserved, erred at the time it confirmed a rate order of the Federal Communications Commission pending judicial review, in

[1] However, the Petition for Certiorari is out of time, as shown at pp. 18-19, *infra*.

not deciding issues with respect to the application of prescribed reductions and increases in rates during the period the injunction would be in effect, such refusal to anticipate these issues being without prejudice to their resolution in the event the rate order is sustained on judicial review.

Statement

Attempting to show that "the issue presented in this case is narrow and sharply defined" (Pet., p. 11),[2] the Government limits its Statement (Pet., pp. 3-9) to selected facts which do not adequately state the nature of the proceedings in the Federal Communications Commission and in the Court of Appeals.

The orders of the Federal Communications Commission in its Docket Nos. 11645 and 11646, now under review in the Court of Appeals, prescribe a comprehensive readjustment of the entire rate structure for the private line services under investigation—a variety of telegraph services furnished by the Western Union Telegraph Company and of telephone and telegraph services furnished jointly by the American Telephone and Telegraph Company and Bell System Associated Companies (hereinafter referred to as the telephone companies). The prescribed reductions of some telephone rates with which the Petition for Certiorari is exclusively concerned are but part of the single rate order under review.

The whole premise of the Government's position in this Court is that the Commission's order dealt separately with one set of rates for private line telephone services and another for private line telegraph services (*e.g.*, Pet., p. 5). This is not the case. Rather, the Commission applied a sin-

[2] "Pet." refers to the Petition for Writ of Certiorari herein.

gle method of ratemaking to the various categories of private line services subject to its order, and the result was a single integrated rate structure for private line services as a whole. The Commission rejected the carriers' traditional reliance upon business judgment of market conditions as a factor in pricing particular private line services. Instead, it applied to the private line rates at issue a formula derived from its conclusions as to costs of furnishing the services, including a prescribed rate of return on net investment.

The Commission first determined for each separate category of telephone and telegraph private line service the earnings produced by the current rates, finding that the rates of return of the telephone companies on particular services ranged from 1.6% to 8.2% (Ex. B, p. 30).[3] The Commission then prescribed rates designed to produce the identical 7¼% rate of return for each category of private line service (Ex. B, pp. 23, 31). The Commission's single theory of conforming the various segments of the rate structure to cost plus a fixed rate of return resulted in a comprehensive readjustment of private line rates embracing both increases and decreases in rates (Ex. B, p. 31).

Throughout its investigation, the Commission adhered to the theory that cost should be the primary if not exclusive standard of ratemaking. At the request of the Commission, the telephone companies and Western Union made studies of their respective costs of providing private line services. These studies were introduced in February 1958 (Ex. A, p. 7). In the latter part of the same year, the Commission ordered an interim reduction of telephone rates amounting to approximately $5,700,000 annually and

[3] "Ex." refers to the exhibits to the Joint Petition for Review filed in the Court of Appeals.

also permitted an interim increase in telegraph rates raising the revenues of the telephone companies by $8,370,000 (Ex. A, pp. 7-9).

After the interim rates became effective, the Commission denied a petition by telegraph users for determination of private line telegraph rates "upon a separate record." In its order, released January 29, 1959, the Commission stated (para. 8):

> "Any determination made by the Commission with respect to the lawfulness of private line teletypewriter [telegraph] rates as contemplated by the aforementioned issues of the general investigation, as well as with respect to the 'interim' rates under suspension, obviously involve the consideration of cost data and other evidence going to questions of rate levels and rate structure common to both determinations. This is also true with respect to the determination of just and reasonable rates applicable to AT&T's private line telephone services which involve cost and rate structure considerations which, in large measure, are inseparable from considerations pertinent to the determination of teletypewriter [telegraph] rates. We do not see how it would be realistic or conducive to an expeditious determination of the issues herein to attempt to fragmentize the proceeding in these respects even if it were possible to do so. . . ."

In its Initial Decision the Commission revised the carriers' cost studies as it deemed necessary (Ex. A, pp. 14-92), and made the resulting costs its basis of ratemaking. In paragraphs of its Initial Decision, approved and adopted in its Final Decision (Ex. B, pp. 26, 28), the Commission said (Ex. A, pp. 96, 104):

> "Generally, we believe that the cost of providing service constitutes the most reliable criterion available for determining just, reasonable and non-discriminatory rates. We shall regard costs either as directly

controlling in the fixing of rates herein or as reference points from which to measure the extent of any departures therefrom, based on other ratemaking considerations. Rates which depart from cost indications must be clearly warranted in order to satisfy our statutory standards of lawfulness. Although earnings levels have been stated herein in terms of specific percentages, it should be understood clearly that we are considering the operating results shown by the cost studies as a reasonable and fair approximation of private line costs rather than as mathematically precise."

* * * *

"With these general principles in mind, we shall endeavor to determine rates which: (a) produce reasonable earnings at approximately the same level for A.T.&T.'s private line telephone, telegraph, and telephotograph services; (b) produce earnings for Western Union's private line telegraph service as close to the proper level for that company as possible without burdening the ratepayer with higher rates for complete telegraph service than would otherwise obtain if A.T.&T. were the sole carrier; (c) result in an equitable distribution of the carriers' revenue requirements among the components within each of their respective private line services; and (d) accord maximum recognition to lower costs experienced by each carrier on competitive offerings consistent with the attainment of the foregoing objectives."

In its Final Decision, the Commission reiterated its adherence to the cost-of-service-rate-of-return formula for all private line rates. The Commission stated (Ex. B, p. 21):

"As the Initial Decision at paragraph 146 stated, there is 'no convincing evidence of record warranting any significant difference in the level of earnings for A.T.&T. between its telephone and telegraph grade services.' Although the two carriers present different arguments on the point, the suggestion by both is that a rate structure which yields the same level of earnings

> from private line telephone services as from private line telegraph services would result in an unwarranted shift of use from the telegraph services to the telephone services, and that this consideration warrants some protection of private line telegraph grade services from the competition of private line telephone services. We refuse to accept that view."

It is particularly misleading for the Government to assert that the telephone companies' earnings from private line telephone rates "were found by the Commission to have been 'unreasonably high'. (Ex. A 103.)" (Pet., 5.) In its Final Decision, the Commission expressly disclaimed any finding that the telephone companies' earnings were excessive, with respect either to their entire operation or to their private line services (Exhibit B, p. 24):

> "The Commission regards the level of earnings here employed in its rate prescriptions and authorizations as neither the maximum nor the minimum figures that might be lawfully adopted. We find these levels of earnings to be reasonable for the purposes here employed. That is as much as the Commission's decision in these proceedings requires. We make no findings concerning the reasonable rate of return for either carrier's system operations during the test year period."

Accordingly, there is no basis for any claim that any private line rates are excessive except within the concept of the Commission's single theory of adjusting all private line rates to a common rate of earnings, a theory that produces both reductions and offsetting increases in private line rates.

The Commission anticipated that the new rate structure prescribed in Docket Nos. 11645 and 11646 would increase the revenues of both carriers (Ex. B, p. 31). A reduction of the telephone companies' revenues from telephone serv-

ices of $1,034,000 was to be offset by an increase in revenues of $3,190,000 from telegraph services, for a net increase of $2,156,000.[4] Western Union's revenues from telegraph service were to be increased $822,000. The Government presents figures for December 1962 erroneously implying that the overall effect of the Commission's rate prescriptions would be a reduction in the telephone companies' revenues (Pet., p. 5).[5] The Commission anticipated

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[4] The Government gives figures of $1.6 million for the anticipated decrease in the telephone companies' revenue from telephone services and $2.7 million for the anticipated increase from telegraph services (Pet., p. 5). These figures are from a table in the Initial Decision superseded in the Final Decision (Exhibit B, p. 31), and erroneously omit telephotograph services.

Contrary to the statement of the Government (Pet., p. 3 note), the Commission prescribed rates for telephotograph and the other types of private line services referred to by the Government as being in issue in the Commission proceedings, so that all are subject to the interlocutory injunction issued by the Court of Appeals.

[5] The Government's reference to "some 4,500 telephone customers" paying rates that the Commission order would reduce (Pet., p. 11) is erroneous. The figure of some 4,500 customers includes both telephone and telegraph customers. See Affidavit of Francis J. Woods, dated July 26, 1963, attached to the telephone companies' Answer to Petitioners' Motion for Temporary Stay and to Petitioners' Application for Interlocutory Injunction.

The claim that "telephone customers" are paying rates that exceed the prescribed rates by more than $5,000,000 per year (Pet., p. 11) is apparently based upon an affidavit, attached to the Government's Supplemental Brief in the court below, indicating that, based upon December 1962 volume of business, the Commission's order would produce an annual reduction of $5,200,000 for telephone services, an increase of $600,000 for telephoto services and an increase of $3,000,000 for telegraph services. These estimates are subject to changes in the volume and mix of the telephone companies' private line business since December 1962. Moreover, all of these figures are net figures reflecting the overall effect of wholesale adjustments, upward and downward, of all private line rates, which

that carrier revenues would be increased. In fact, because of changes since the Commission proceedings in volume and mix of private line service furnished by the telephone companies, the present net effect of the Commission's rate structure would be that, to a substantial extent, increases in charges would offset decreases in charges.[6]

The Commission's adjustment of rates for the various categories of private line services to a strict cost-of-service rate-of-return standard would produce a great variety of changes, both increases and decreases, in private line rates. Although there would be net reductions in rates for "telephone grade services" as a whole (Ex. B, p. 39, col. (6)), the rates for some "telephone grade services," notably telephotograph services and some short-haul services, would be increased (Ex. A, p. 126; Ex. B, p. 42; Ex. B, p. 39, col. (5)). Thus some customers for telephone grade services would pay net increases, and many would receive net reductions. And, although there would be increases in rates for "telegraph grade services" as a whole (Ex. B, p. 40, col. (9)), the rates for some "telegraph grade services" would be reduced. For example, the existing "monthly rate per mile for continuous service" for the first 250 miles would be reduced from $1.45 (Ex. A, p. 126) to $1.10 (Ex. B, p. 42).

Both the increases and reductions in private line rates would result from the new rate structure prescribed by the

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produce aggregate gross revenues of well over $100,000,000 annually. Each figure includes both increases and reductions in the rates paid by individual customers.

[6] Affidavit of Francis J. Woods, dated July 26, 1963, attached to the telephone companies' Answer to Petitioners' Motion for Temporary Stay and to Petitioners' Application for Interlocutory Injunction.

Commission in a single order based on a single theory of ratemaking. This single order was before the Court of Appeals when it granted a temporary stay and an interlocutory injunction. Both the increases and the decreases would require consideration should this Court grant certiorari to review that interlocutory injunction. Thus, the issue in this case is not so "narrow and sharply defined" as the Government would have it (Pet., p. 11). The Government shows no justification for selecting prescribed reductions in telephone rates for its special attention and ignoring all other reductions and increases prescribed by the Commission.

There is no substance in the Government's statement that telephone rates "had not been challenged in the petition for review," or that "telegraph rates . . . alone were in issue" in the court below (Pet., pp. 8, 10). In fact, the Joint Petition for Review expressly attacks the Commission's cost theory which underlies the prescription of all private line rates (Petition for Review, pp. 9-10). As the petitioning meat packers stated in the court below, the grounds of their action "challenge the validity of the F.C.C. orders in their entirety" (Reply to Motions for Modification of Temporary Stay, dated August 12, 1963, p. 2).

Finally, the Government erroneously states that a duty to make refunds should be imposed upon AT&T "as a condition of granting it [AT&T] equitable relief" (Pet., p. 10). At no time did the telephone companies apply to the Court of Appeals for stay or injunction of the administrative orders under review. The petition for review was filed in the Court of Appeals by three users of private line services. In their Answer to the Motion for Temporary Stay and the Application for Interlocutory Injunction filed by the petitioning users in the court below, the telephone companies asked that both the stay and the injunction be de-

nied. The telephone companies did not object to the Commission's order going into effect at once. The telephone companies did show, in the alternative, that if any injunction were entered, the equities of this case, in which the Commission prescribed simultaneous reductions and increases in rates, require that the injunction apply to the orders under review in their entirety. The alternative approach was adopted by the Court of Appeals. The Government is not contending in this Court that an interlocutory injunction should not have been issued by the Court of Appeals, and the Government expressly states that it does not contend that "it was an abuse of discretion to hold the telephone rates in abeyance pending the outcome of the appeal" (Pet., p. 16).

REASONS FOR DENYING THE WRIT

I.

The Petition Seeks Premature and Unnecessary Review By This Court.

A. The Court Of Appeals Properly Deferred Decision Of Issues Respecting Restitution.

The reasoning of the Government's argument runs as follows:

> The private line telephone rates now in effect are "presumptively excessive" (Pet., p. 17);
>
> Telephone rate payers are entitled to refunds if the Commission's order is upheld upon judicial review (Pet., pp. 11-14); and,
>
> In the absence of appropriate records, there is grave danger that refunds will not be feasible (Pet., pp. 13, 17).

The question whether any of the present private line telephone rates are excessive, together with the question whether other private line telephone rates and telegraph rates are unduly low, depends upon the validity of the Commission's single theory of making all such rates in relation to cost of service plus a fixed rate of return, without regard to value of service, including customer impact, and other factors normally entering into the determination of rates for particular services. This is one of the issues being litigated in the Court of Appeals.

The question whether telephone ratepayers should receive refunds for the period in which the interlocutory injunction is in effect is not the isolated issue the Government represents it to be. If the Commission's order is sustained on the merits, the equitable issue of restitution would involve a great deal more than the reductions in telephone rates discussed by the Government in its Petition. In addition to reductions in some telephone rates, the Commission ordered increases in other telephone rates, reductions in some telegraph rates, and increases in other telegraph rates. All of these increases and reductions have been held in abeyance by the interlocutory injunction; all must be taken into account in the event the consideration of restitution becomes necessary.

So-called "protective conditions" like those the Government seeks are entirely inequitable. Such "protective conditions," limited to users of private line telephone services whose rates would have been reduced by the Commission's orders, would afford no protection to any users of private line telegraph services (some of whose rates were reduced) and, most significantly, would not take into account at all the recoupment of the simultaneous increases in rates prescribed by the Commission in the same order and on the same theory of ratemaking. By improperly severing

the integrated rate structure prescribed by the Commission. The "protective conditions" sought by the Government would commit the telephone companies to bear rate reductions without any provision for the complementary rate increases prescribed in the same order under the same theory.

The equitable issues arising from the stay of an administrative order prescribing both reductions and offsetting increases in rates are very different from the issues presented in the cases relied upon by the Government. In those cases (Pet., pp. 12, 14), the utilities' right to certain revenues was determined in the litigation. In the instant case, the Commission has readjusted rate relationships without substantially changing the overall revenues of the telephone companies. Some rate payers are resisting rate increases, while the benefits of rate reductions are sought on behalf of others. The telephone companies are essentially in the role of stakeholders. The equities of this situation are very different from those in a case in which a utility opposing its customers seeks and obtains a stay of a rate reduction order. Here, for all practical purposes, the contest with respect to rates for the period in which the injunction was in effect will, if the Commission's order is sustained, be between the private line users whose rates were reduced and those whose rates were increased by the Commission's order: any contention that the utility should bear the reduced rates without receiving the increased rates prescribed simultaneously in a single order based on a single theory of ratemaking would be manifestly inequitable.

Because the equitable issues that would arise in the event the Commission's order is sustained are substantial and novel, the Government's request that such issues be resolved summarily, without briefing and oral argument (Pet., pp. 17-18), is entirely unjustified.

More fundamentally, however, there is no occasion for review in this Court at this time of the equitable issues that might arise if the Commission's order is sustained. The Court of Appeals did not decide the equitable issues which the Government asks this Court to resolve. The Court of Appeals has done nothing to prejudice the raising of any claim by any party if and when the Commission's order is sustained.

The several cases the Government cites (Pet., pp. 11-12) do not support its argument that the Court of Appeals abused its discretion by failing to "condition" the interlocutory injunction as the Government requested. None of the cited cases holds that a court that grants an interlocutory injunction must simultaneously rule on restitution. On the contrary, in one of the cases cited, *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781 (1929), the Court held that *after* judicial review of an administrative order was completed, the lower court then had the power and the duty to rule on issues of restitution (279 U.S. at 786-787).

Under the circumstances of this case, the Court of Appeals' refusal to rule on restitution issues at the time it granted the interlocutory injunction was entirely appropriate. Under the Government's own argument, these issues arise only if the rates ordered by the Commission are not set aside on judicial review (Pet., p. 12). And, in such event, determination of the equitable issues will be facilitated by the fuller understanding of the nature and effect of the Commission's order gained in the consideration of that order on judicial review.

B. Since Adequate Records Are Being Kept, There Is No Threat To Any Rights Of Rate Payers.

The sole ground asserted by the Government for action by this Court at this stage of the proceeding is not that

there is any need for resolving the equitable issues at this time, but that there is need for preserving the efficacy of a possible restitution order (Pet., pp. 12-13):

> "From these principles and decisions it plainly follows that if the lower telephone rates ordered by the Commission are ultimately upheld (or left unaffected) by the Seventh Circuit's decision on the merits, the telephone customers will at that time be entitled to an order requiring restitution of the excessive amounts collected under color of the injunction. Moreover, since the court of appeals would be obligated to order restitution at the close of the case, it was equally under a duty to preserve the efficacy of that remedy by attaching protective conditions at the time of issuing the injunction."

With respect to the critical question of future "efficacy" of any restitution order, the Government's entire Petition to this Court turns on the claimed absence of assurance that adequate records will be maintained during the period of the litigation. The conclusion of the Petition illustrates this dependence upon the "record-keeping" point (Pet., p. 17):

> "This is a case in which relief must be expeditious if it is to be meaningful. So long as the injunction contains no record-keeping requirements, there is a likelihood that refunds will not be feasible even if the court of appeals should ultimately order them."

Similarly, in the body of the argument, the sole reason for action by this Court at this time turns on the claim that "we have no assurance that the records currently maintained by AT&T will enable it to compute retroactively the billing it would have made had the Commission's order not been stayed" (Pet., p. 13).

Thus, the whole argument for action by this Court at this time is based upon the need for "assurance" that

the telephone companies will maintain adequate records during the period of the litigation.

The fact is that the telephone companies have been keeping adequate records throughout the proceedings in the Court of Appeals, they are now doing so, and they will continue to do so. The telephone companies stated in the Court of Appeals,[7] and they state again in this Court, that they have maintained and will continue to maintain and preserve billing records for all users of private line services affected by the Commission's order. These billing records are adequate to permit a computation for each customer of the differences between the charges paid while the Commission's order is enjoined and charges that would have been paid during the same period had that order not been enjoined.

The telephone companies' representation that adequate records are being maintained and preserved was never challenged in the court below by the Government or by anyone else. Furthermore, after the Petition for Certiorari was filed, the Government in effect abandoned its claim respecting record-keeping in this Court. As noted in the Petition (p. 18), the Government applied for "an appropriate injunctive order from the Circuit Justice pending the action of this Court." The application was for a mandatory injunction "requiring AT&T to maintain records." On January 6, 1964, the telephone companies filed a stipulation in the Court of Appeals wherein they gave further and formal assurance that

> "records will be maintained and preserved which will permit a computation, retroactive to August 1, 1963,

[7] Response of AT&T et al. in opposition to Motion for Order Requiring the Filing of a Bond and Accounting, dated August 26, 1963 (attached hereto as Appendix A), pp. 21, 29, *infra*.

> of the difference between the rates and charges on which the bills for Bell System interstate private line services subject to the above orders of the Commission have been based and the rates and charges which would have been in effect but for the stay and injunction ordered by [the Court of Appeals]".[8]

By letter of January 10, 1964, addressed to the Clerk of this Court, the Solicitor General withdrew the Government's application for injunction, as follows:

> "In the light of formal commitments received from American Telephone and Telegraph Company and associated companies in their reply to the government's application for a writ of injunction, it is requested that this application be withdrawn."

Since adequate records are being maintained and preserved, any rights of ratepayers are fully preserved. If the Commission's order under review is sustained on the merits, the Court of Appeals may then turn to issues of restitution. Because complete records necessary to computation of any restitution that may be decreed will be available, there is no occasion whatever for a grant of certiorari by this Court at this time.

For the foregoing reasons, there is no basis in fact for the Government's request for action by this Court at

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[8] A copy of this formal assurance, which is part of the certified record in this Court, is attached hereto as Appendix B, p. 31, *infra*.

Because the Court of Appeals has not yet ruled on any issue respecting restitution and the Government is premature in requesting that this Court provide for possible refunds to a selected class of private line customers, the telephone companies' preservation of records is without prejudice to any position on the questions whether refunds should be made to customers whose rates would have been reduced by the Commission's order and whether additional payments should be made by customers whose rates were increased by that order.

this time. The refusal of the Court of Appeals to anticipate equitable issues that might arise at a later stage of the proceeding was entirely correct and without prejudice to any party in light of the assurance that adequate records are being maintained by the telephone companies.

II.

Error By The Court Of Appeals, Even If Shown, Would Not Warrant Review By This Court.

It should be noted further that even if the Court of Appeals erred, a showing of error at the interlocutory stage of a proceeding in a lower court does not alone warrant action by this Court. In *United States* v. *Beatty*, 232 U.S. 463, 468 (1914), the Court stated:

> "Interlocutory rulings not infrequently become of no importance by reason of the final result or of intervening matters, and that may be true here. But if the decision ultimately operates prejudiciously to the United States, it can be reviewed and, if need be, corrected. . . ."

Cf. American Construction Co. v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893), where the Court said it should not "review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

No such extraordinary reasons for review in this Court are present at this stage of the instant proceeding, even if the Court of Appeals had erred in any of its rulings (as it has not).

III.

The Petition Is Out Of Time.

The Petition asks this Court for "expeditious" relief (Pet., p. 17). The Government itself has been anything but expeditious. The Government first presented its request that the telephone companies be ordered to keep records on August 16, 1963, by moving in the Court of Appeals that the telephone companies be required to file with the Court special monthly accounting reports.[9] The motion was denied. The Government repeated the request for special monthly accounting reports in the argument below with respect to the interlocutory injunction; that request was rejected by the Court of Appeals in its order dated September 27, 1963, and by the court, sitting *en banc*, in its order dated November 12, 1963, denying rehearing. After waiting three months from the issuance of the interlocutory injunction, and on the forty-fifth day from the denial of the petition for rehearing *en banc*, the Government filed its Petition for Certiorari on December 27, 1963. The case has progressed in the court below to the stage at which the petitioning users have filed a brief on the merits together with five volumes of printed record as an appendix, and the briefs of respondents will be due as soon as the court below sets a date in response to the Government's motion for extension of the January 22, 1964, due date (which the telephone companies were prepared to meet).

[9] Preparation and filing of special monthly reports, as contrasted with preservation of the billing records, would have imposed a wholly unnecessary burden on the telephone companies. The Government has abandoned any such request in this Court.

Of greater significance with respect to the jurisdiction of this Court, the Government's Petition for Certiorari is out of time. The Petition was filed December 27, 1963, forty-five days after denial of the petition for rehearing *en banc*, but ninety-one days after the entry of the interlocutory injunction to which the Petition is directed. The applicable statute provides (5 U.S.C. § 1040):

> "An order granting or denying an interlocutory injunction under Section 9(b) of this Act shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in Title 28, United States Code, Section 1254(1): *Provided*, that application therefor be duly made within forty-five days after the entry of such order."

The usual rule that the time for application for appellate review is tolled by a petition for rehearing should not apply where review is sought of an interlocutory order such as the one at issue here, because the rationale of that rule is inapplicable. A petition for rehearing tolls the time to apply for review because it deprives the judgment "of that finality which is essential to appealability." *Leishman* v. *Associated Wholesale Electric Co.*, 318 U.S. 203, 205 (1943); cf. *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942). But no such finality is "essential" where an interlocutory order is made appealable by statute.

Accordingly, the Government had "forty-five days after the entry" of the interlocutory injunction within which to file its Petition. The interlocutory injunction was entered on September 27, 1963. The Petition for Certiorari was filed on December 27, 1963, long after the forty-five day period prescribed by statute had expired.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied. If the Petition is granted, the Government's request for summary disposition should be denied, so that this case may be heard on briefs and argument.

Respectfully submitted,

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January, 1964.

Appendix A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

WILSON & CO., INC., SWIFT & COMPANY, and ARMOUR AND COMPANY, Petitioners, vs. FEDERAL COMMUNICATIONS COMMISSION, et al., Respondents.	No. 14269 Petition for Review of Orders of an Administrative Agency.

RESPONSE OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND BELL SYSTEM ASSOCIATED COMPANIES IN OPPOSITION TO THE MOTION OF THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION FOR AN ORDER REQUIRING THE FILING OF A BOND AND ACCOUNTING

THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY and BELL SYSTEM ASSOCIATED COMPANIES (hereinafter referred to as the telephone companies) hereby oppose the motion of the United States and the Federal Communications Commission (hereinafter referred to as the Government) "for an order requiring the filing of a bond and accounting by the American Telephone and Telegraph Company and Bell System Associated Companies," on the following grounds:

Statement

This case was initiated by three users of private line services furnished by the Western Union Telegraph Co.

and by the telephone companies. The Joint Petition for Review herein challenges the orders of the Federal Communications Commission in FCC Dockets Nos. 11645 and 11646, wherein the Commission prescribed a comprehensive rate structure, effective August 1, 1963, for all private line services at issue in those dockets—a variety of telegraph services furnished by Western Union and of telephone and telegraph services furnished by the telephone companies.

In a Motion for Temporary Stay filed with their petition, petitioners requested relief only insofar as the FCC orders under review prescribed rates for private line services "furnished petitioners." This Court, however, by order of July 31, 1963, issued a temporary stay applying generally to the orders under review and suspending their operation in their entirety.

On August 5, 1963, the Government filed an "emergency motion" requesting that the temporary stay be modified so as to apply "only to those portions of the Commission's orders in Dockets Nos. 11645 and 11646 which deal with private line telegraph services." This Court, declining to except rates for private line telephone services from the stay, denied the "emergency motion" by order of August 13, 1963.

The telephone companies filed an answer to petitioners' Motion for Temporary Stay and a response in opposition to the Government's "emergency motion." At no time have the telephone companies applied to the Court for a stay of the orders under review. Rather, they have showed that in the circumstances of this case only a complete stay or no stay at all can be appropriate. For a partial stay of the orders under review would dismember a single integrated rate structure, create and compound discrimination and

preference, and inflict severe and needless injury upon the telephone companies.

Now the Government, in the pending motion filed six days after denial of its "emergency motion," requests an order by this Court requiring the telephone companies (1) to post a $1,000,000 bond, wherein they would (2) "agree" to render to the Court special monthly accounting reports showing "in detail" all amounts received after August 1, 1963, from users of private line telephone services "by reason of the Court's order of July 31, 1963," and (3) "agree," in the event the FCC orders before this Court are not set aside, to make refunds, with interest, to users of private line telephone services paying rates that would have been reduced August 1, 1963, but for the temporary stay issued by this Court. (Motion, pp. 1-2.) As shown below, the pending motion is in essence a renewal of the Government's "emergency motion." For this and other reasons, it should be denied.

1. The Government's Motion Is Predicated Upon An Erroneous And Inequitable Double Standard

The bond that the Government would have this Court order the telephone companies to file would represent far more than "the principal amount of $1,000,000" and "accurate accounts in detail." In the bond requested the telephone companies would be compelled to "agree" to "refund to the users of private line services, other than telegraph grade services, any portion of the revenues collected by virtue of the Stay which are in excess of the rates for such services prescribed by the Commission's orders to be effective from August 1, 1963, in the event that the Commission's orders prescribing rates for such services are not set aside by this Court" (Motion, p. 2).

The proposed bond would provide special accounting and refunds for only part of the private lines rates prescribed in the FCC orders under review. The terms of the bond would limit it to telephone grade services (those "other than telegraph grade services"), and it would cover only those rates as to which the Commission prescribed a reduction. In seeking such a bond, the Government repeats the erroneous insistence upon the separability of the rate structure prescribed by the FCC for private line services that was the primary ground of the "emergency motion" denied by the order of this Court dated August 13, 1963. The integral and inseparable nature of that rate structure—based on a single theory of rate-making applied to the rates for all private line services—is shown in the telephone companies' response, dated August 12, 1963, to the Government's "emergency motion." To avoid repetition, that response is incorporated herein by reference.*

The Government's pending motion is even more extreme. It would not only separate telephone from telegraph services, but even within the telephone grade services, the motion would have the Court treat rates that would be reduced by orders of the FCC differently from rates that would be increased. The Government concedes that there are some "private line telephone grade rates . . . where increased rates were prescribed" (Motion, p. 4), but the motion is directed only to those telephone rates that would be reduced (Motion, p. 2).

The Commission prescribed a great variety of changes, both increases and decreases, in private line telephone

* A substantial portion of the Government's motion is essentially a reply to the telephone companies' response date August 12, 1963 (Motion, pp. 6-8). Since this reply material is not pertinent to the pending motion, no response is made here to the numerous misleading statements it contains.

rates.* The Government seeks to sever the rate prescription in such a way that, if the Commission orders are not set aside by the Court, the telephone companies would be committed in advance to pay refunds to all users of private line telephone services who would have received reductions in rates. (Incongruously, the Government would not require refunds to those users of private line telegraph services whose rates would have been reduced.)

But what about the increases in rates? If resettlements, secured by bonds, are to be required, such a provision is also appropriate for petitioners and other users of private line telegraph and telephone services who would be paying increased private line rates but for the stay issued by this Court. The practical fact is that the FCC prescribed both increases and reductions in rates. If, as the Government argues, there should be resettlements to the prescribed basis retroactive to August 1, 1963, resettlements could not be a one way street. If the telephone companies are obliged to refund to reduced rate levels, petitioners and many other users should be equally obliged to pay increased rates retroactive to the same date.

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* Although there would be net reductions in rates for "telephone grade services" as a whole (Exhibit B, p. 39, col. (6)), the rates for some "telephone grade services," notably telephotograph services and some short-haul services, would be increased (Exhibit A, p. 126; Exhibit B, p. 39, col. (5); Exhibit B, p. 42). Thus some customers for telephone grade services would pay net increases and some would receive net reductions.

And, although there would be increases in rates for "telegraph grade services" as a whole (Exhibit B, p. 40, col. (9)), the rates for some "telegraph grade services" would be reduced. For example, the existing "monthly rate per mile for continuous service" for the first 250 miles would be reduced from $1.45 (Exhibit A, p. 126) to $1.10 (Exhibit B, p. 42).

The Government claims that the telephone companies should be required to post bond wherein they agree to make refunds with respect to telephone rates reduced by the Commission's orders. The theory of this claim applies equally to petitioners and other users of private line services (over 4,500 in number) with respect to rates increased by the Commission orders. If the Government's motion is sound and reasonable, it is equally sound and reasonable to enter a companion order adding users of private line services as parties hereto and directing them to post adequate bond wherein they agree, in the event the FCC orders under review are sustained, to pay the difference between rates kept in effect by the stay of July 31, 1963, and rates as increased by the Commission orders.

It is clear that all the increases and decreases in rates for all types of private line services prescribed by the FCC form a single rate structure, not susceptible of division. The Government's renewed effort to create a double standard is clearly inequitable and its motion should be denied as based upon the same false premise as its "emergency motion" denied by the order of this Court dated August 13, 1963.

2. The Grounds Advanced By The Government In Support Of Its Motion Are Erroneous

In support of its "refund" theory, the Government makes a number of erroneous statements regarding the scope and effect of this Court's review of the rate structure the FCC prescribed for private line services. It is said, for example, that if the FCC's orders are sustained "the end result when the stay expires may be that the telephone rates prescribed in the tariffs filed by AT&T, to be effective August 1, 1963, were the lawful rates for this period." On this basis, the Government envisions suits by users

of private line telephone services "to recover the excess collected by AT&T after August 1, 1963." (Motion, p. 8.)

In fact, the changes in rates filed by the telephone companies "to be effective August 1, 1963," have not become effective and cannot become effective until such time as the stay of the orders that required them may be vacated by this Court. All such changes in rates, for private line services of all types, were filed because the FCC so ordered, and all were filed specifically as "changes in regulations and rates made in compliance with the decisions and orders of the Federal Communications Commission . . . in Dockets No. 11645 and No. 11646." (Affidavit of Francis J. Woods, attached to Answer of AT&T et al. dated July 29, 1963, pp. 1-2.) When the underlying FCC orders which produced changes in rates are stayed, those changes in rates are also stayed, and the old rates remain the lawfully effective rates.

The cases cited by the Government (Motion, pp. 9-10) are not remotely in point. These cases arose where a utility, in resisting a general rate reduction, petitioned the Court for a stay, and the stay was conditioned on an agreement by the petitioner to refund to the prescribed basis if the order was upheld. The Government's motion adopts the terminology of the stays entered in that type of case, such stays being conditioned upon certain undertakings and agreements of the utility (Motion, pp. 2, 9-10). Indeed, the Government states that its request is "patterned after an order entered . . . by the Eighth Circuit" in such a case (Motion, p. 10).*

* The case is *State Corporation Commission of Kansas* v. *Federal Power Commission*, 206 F.2d 690 (8th Cir. 1953), cert. denied, 346 U.S. 922. The stay order to which the Government refers (not discussed in the report of the case) was entered in proceedings in which the petition of the Kansas Commission was consolidated

The whole theory of the Government's motion is that conditions should be placed upon the telephone companies because it is equitable for AT&T to agree to assume certain burdens which the Government claims will arise from "the stay order it [AT&T] requested" (Motion, p. 9). The Government's argument misconceives the facts of this case. The telephone companies did not institute this Court action, and did not seek a stay nor make undertakings or "agreements" as a condition of obtaining a stay. Petitioners, three users of private line services whose rates would have been increased, asked for the stay. When a stay was requested "as to petitioners," the telephone companies pointed out that a stay in such a form would compound the discrimination as between users of private line services, requested petitioners' motion for stay be denied and, in the alternative, moved that if the FCC's orders are stayed at all, they be stayed in their entirety. (Answer of AT&T et al. dated July 29, 1963, pp. 1-2.)

This is not a case in which the utility's position is adversary to that of the consuming public. Because the FCC's orders prescribed substantially offsetting increases and reductions in rates, the net effect upon the using public as a whole is not substantial. The effect of the FCC's orders would be a redistribution of the rates as between various classes of customers. For the same reasons, the effect on the telephone companies' revenues would be substantially offsetting if the FCC's orders became effective.

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with petitions for review of Federal Power Commission orders filed by Northern Natural Gas Company. The order of the Eighth Circuit used as the pattern in the Government's motion was specifically issued "upon the petition of Northern Natural Gas Company" (order dated December 18, 1952, in cases Nos. 14704, 14708, 14733, p. 1). The Kansas Commission supported the higher rates, in the interest of Kansas gas producers. (206 F.2d at 698.)

And, of course, a stay of the orders in their entirety does not affect the telephone companies' revenues. It is only when petitioners, initially, and thereafter the Government, seek to stay the orders in part, or require refunds as to part of the rate structure, that the telephone companies would be severely and needlessly injured.

Apart from the unfairness of the Government's attempt to require refunds for that portion of the FCC's orders which reduce private line telephone rates, the Government's request for bond, and for special monthly accounting reports for each of thousands of customers would impose a wholly unnecessary burden. Even if the Government's other premises were sound (and they are not), there is no basis for requiring the telephone companies, financially sound as they are, to file a bond as security. Nor is there any basis for burdening the telephone companies with the preparation of special accounting reports, sworn to and filed monthly as to each such user of private line services. There is no problem here of preserving records because the telephone companies will of course maintain billing records for all of the users affected by the FCC's orders.

The Government's suggestion that expeditious action in its motion for bond and accounting would assist the Commission in "separate but related" cases (Motion, pp. 10-11), is incomprehensible. Early decision by this Court of the merits of this case might aid the Commission in its disposition of other cases, but it is not credible that any action by this Court, expeditious or otherwise, on a motion for bond and accounting in this case would provide any assistance to the Commission in dealing with any other case.

Conclusion

Once again, the issue before the Court is whether certain rates can properly be isolated from the private line rate structure prescribed by the FCC and treated separately. Once again, the only sound conclusion is that they cannot. The Government's pending motion should be denied as was its "emergency motion."

WHEREFORE, the AMERICAN TELEPHONE AND TELEGRAPH COMPANY and BELL SYSTEM ASSOCIATED COMPANIES pray that the Motion of the United States of America and the Federal Communications Commission for an Order requiring the filing of a Bond and Accounting be denied.

Respectfully submitted,

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Dated: August 26, 1963.

Appendix B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

WILSON & CO., INC., SWIFT & COMPANY, and ARMOUR AND COMPANY, Petitioners, vs. FEDERAL COMMUNICATIONS COMMISSION, et al., Respondents.	No. 14269 Petition for Review of Orders of an Administrative Agency.

STIPULATION

It is hereby stipulated that, during the pendency of this proceeding for review of the orders of the Federal Communications Commission in its Dockets Nos. 11645 and 11646, records will be maintained and preserved which will permit a computation, retroactive to August 1, 1963, of the difference between the rates and charges on which the bills for Bell System interstate private line services subject to the above orders of the Commission have been based and the rates and charges which would have been in effect but for the stay and injunction ordered by this Court. These records are being maintained and preserved, and this stipulation filed, without prejudice to any position which may be taken on questions of whether or not refunds should be made to customers whose rates would have been reduced by the Commission's orders or additional payments should

be made by customers whose rates would have been increased by the Commission's orders.

Stipulated this 3rd day of January, 1964.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 711

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

WILSON & COMPANY, SWIFT & COMPANY, AND ARMOUR & COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is filed by the Solicitor General, on behalf of the United States, in the light of developments which have taken place since December 27, 1963, when the United States and the Federal Communications Commission filed a joint petition in this cause. As we explain below, the Solicitor General no longer believes that the case, in its present posture, warrants intervention by this Court. The Commission, which is a separate party and is authorized to seek review in its own right in this type of proceeding (see 47 U.S.C. 402(a); 5 U.S.C. 1031–1042), remains of the opinion, however, that the Court should grant review at this interlocutory stage. Accordingly, the petition has not been withdrawn.

When the court below stayed the effectiveness of the Commission's reduction in the rates for private-line telephone service, it failed to enter what the government regards as appropriate conditions. As argued in the petition, the court of appeals should have (1) made it explicit that there will be an obligation to make refunds at the conclusion of the review proceeding if the Commission's order is sustained, and (2) avoided the danger of irreparable injury to the customers by requiring AT & T to maintain records permitting a prompt computation of the refund obligations. The latter consideration gave urgency to the petition. As we stated in the concluding paragraph of the petition, "So long as the injunction contains no record-keeping requirements, there is a likelihood that refunds will not be feasible even if the court of appeals should ultimately order them."

Because of this same consideration, the government, contemporaneously with the filing of the petition, applied to Mr. Justice Clark, as Circuit Justice, for a writ of injunction "requiring AT & T to maintain records which will enable it to render a prompt accounting to its telephone customers should such an accounting ultimately be ordered by the court of appeals * * *." In response to this application, AT & T (together with its associated companies) gave assurance that it was in fact keeping such records and committed itself to do so during the pendency of the review proceedings. Since this commitment met all of the government's demands in relation to record keeping, the application to Mr. Justice Clark was

thereupon withdrawn. See brief in opposition filed by respondent AT & T, p. 16.

The only subsisting question, therefore, is whether this Court should now consider the failure of the court of appeals to include in its injunction *pendente lite* a declaration or condition that AT & T will be obliged to make restitution at the conclusion of the proceeding if the Commission's rate order is sustained.

We adhere to our conviction that the omission was a plain error of law; but we cannot represent, as the case now stands, that the omission creates a need—much less the imperious necessity traditionally deemed requisite—for interlocutory review by this Court. If the Commission's order concerning the telephone rates is reversed on the merits, there may be no right to restitution. If the court of appeals sustains the Commission's direction that the telephone rates be reduced, then restitution of the excess charges collected during the period that the injunction was in effect should be ordered. That relief is well within the power of the court of appeals. "It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process." *Arkadelphia Co.* v. *St. Louis S. W. R.R. Co.*, 249 U.S. 134, 145–146. Presumably the court of appeals will grant the required relief. If it affirms the order but fails to direct restitution, both the Commission and the United States will still be in a position to seek effective relief from this Court. There is no question of the financial ability of AT & T to respond to any order of restitution.

The only conceivable difference between this case and *Arkadelphia, supra,* is that AT & T might ultimately argue against restitution on the grounds (1) that in the instant case increased rates as well as decreased rates were stayed; (2) that it will experience difficulty, especially in view of the passage of time, in collecting undercharges; and (3) that the appropriate disposition, if the court of appeals upholds the Commission's rate order, is to leave the parties where it finds them so far as liabilities for the past period are concerned. We believe, however, that this is plainly unsound. AT & T filed no petition to review the lowered telephone rates, and it will hardly be in a position to defend the just claims of its telephone customers on the ground that certain of its telegraph customers instituted litigation attacking telegraph rates. In all events, as AT & T recognizes (Br. in Opp., p. 13), all issues now open will remain open when the court of appeals passes upon the merits of the Commission's rate order.

The short of the matter, therefore, is that although a proper order would have avoided doubt, no one has actually been prejudiced by the court of appeals' failure to declare the conditional liability of AT & T. Nor is certiorari likely to expedite the final outcome, for we are advised that the court of appeals will hear argument on the merits of the Commission's order by early Spring.

Accordingly, the Solicitor General is of the view that the case, in its present posture, makes no proper

demand upon this Court's time, and he withdraws his support of the petition.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

RALPH S. SPRITZER,
Assistant to the Solicitor General.

FEBRUARY 1964.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner

vs.

WILSON & CO., INC., SWIFT & COMPANY, AND ARMOUR AND COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX OF RESPONDENTS WILSON & CO., INC., ET AL.

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ARMOUR AND COMPANY

La Salle Street Press—Chicago 10

IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

APPENDIX OF RESPONDENTS WILSON & CO., INC., ET AL

In view of the belated attempt by the Federal Communications Commission to add another issue in this *certiorari* proceeding by resurrecting its Additional Pleading filed with the Court of Appeals *after* the Commission had petitioned that court for rehearing on the order granting an interlocutory injunction, the meatpacker respondents herein

ask leave to file this Appendix incorporating their reply to such Additional Pleading which was the only reply thereto filed below.

Respectfully submitted,

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Counsel for Respondents
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SWIFT & COMPANY, AND
ARMOUR AND COMPANY

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

WILSON & CO., INC., SWIFT & COMPANY, AND ARMOUR AND COMPANY, *Petitioners,* vs. FEDERAL COMMUNICATIONS COMMISSION, et al., *Respondents.*	No. 14269 Petition for Review of an Order of the Federal Communications Commission

PETITIONERS' REPLY TO ADDITIONAL PLEADING OF UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION

For the reasons hereinafter stated, petitioners oppose the latest refund proposal filed by the United States and the Federal Communications Commission. Petitioners are convinced that once the Court considers the ramifications and hopeless complexities of the Government's refund proposition, the Court will find it unacceptable. Petitioners submit that injunctive relief is the only feasible and defensible solution to the problem confronting the Court here. Under the circumstances involved in this appeal, the interlocutory injunction provides the simplest mechanics and fairest results for all interested parties, including the large number

of private line users not represented or appearing before this Court.

Petitioners' initial request for an interlocutory injunction limited in scope was made only after thoughtful deliberation of several alternative remedies which would give petitioners the protection required to avoid irreparable damage. A refund alternative comparable to that now proposed by the Government was carefully considered by counsel for petitioners.

As a result of many years experience in representation of utilities in countless rate matters, including several experiences with refunds by utilities to large numbers of customers, counsel for petitioners have found that the administration of refunds is extremely complex and almost automatically results in protracting litigation. Our experience has been that refunds of excess charges to customers can promote an endless tide of customer complaints respecting computation of their respective refunds. We have found also that the expense of distribution of refunds is substantial and results in a very real diminution of the amount ultimately recovered by the customers. In addition, under the peculiar circumstances of this appeal, it may be anticipated that substantial claims for attorneys' fees would be made against the fund available for refund.

Because of these complexities which are inherent in the Government's proposal, counsel for petitioners did not feel justified in asking this appellate court to take on the heavy burdens implicit in the administration of a refund as proposed by the Government. While in appeals of certain rate orders the assumption of such obligations by a trial court may be justified, none of such considerations are present here.

The Government has failed in any of its motions, briefs or other pleadings to cite any precedent for their refund proposal where the rate order provided for both increases and decreases in charges. To the best knowledge of counsel for petitioners there is no such precedent.

The situation now confronting the Court is in no way comparable to the case where a utility appeals from a denial of a requested rate increase and agrees, as the price of charging the higher rates pending appeal, to refund the excess charges if its appeal is unsuccessful.

First, it is obvious that, in the latter case, there is at least some chance that no refund will ever be required. But in this appeal, if the Government's proposal were adopted, refunds would have to be made no matter who is successful. Whatever the outcome, AT&T and Western Union would each be obligated to refund excess charges paid by perhaps half of their customers.

Second, where the utility appeals from a rate order and continues to collect higher charges than are ultimately found reasonable, the expense of distribution of refunds, as well as the expense of the litigation, is a risk assumed by the utility, and not borne by the customers. In the situation of this appeal, however, could the carrier be fairly asked to assume the cost of distribution of a refund for which they were not responsible? Whether or not petitioners are successful in this appeal, it must be anticipated that the refund due and payable to certain customers would be reduced by the costs of such distribution and by the carriers' costs of litigation as well. And, if petitioners are successful in this appeal, the refund would be further reduced by their own costs of litigation.

The Court should be apprized of still another undisclosed and very significant aspect inherent in the Government's proposal. This hidden feature also holds out the promise that the administration of the refund will remain with the Court for years.

In the event that petitioners' appeal is successful and the FCC orders are reversed and set aside, it will become necessary to determine the amount of refund which should be paid to petitioners and all other customers who would have sustained rate increases under the FCC orders. In order to make this computation it would be necessary to determine what were the lawful rates during the appeal period. Some of the parties seem to have wrongfully assumed that the 1958 interim rates would be the legal rates.

But, if anything is certain, it is that *the interim rates cannot be the lawful rates* if the FCC orders are reversed, because the only authority for the interim rates is the FCC's final order itself. *Both the interim rates and the rates finally prescribed are at issue in this appeal.*

Under these circumstances, there are just two alternatives open. One is to treat the pre-interim rates as the lawful rates (see *City of Edwardsville* v. *Illinois Bell Telephone Co.*, 310 Ill. 618, 1924). This could result in a refund to petitioners of roughly ⅓ of the rates prescribed in the FCC order here under review. The other alternative would be to delay the refund until the FCC on remand had established reasonable rates in compliance with the Court's order of reversal, and such finding on remand had been ultimately sustained on review.

Consequently, unless the carriers *consent* to an order which would provide for the refund to petitioners (and others similarly situated) of the entire differential between

the prescribed rates and the pre-interim rates, the distribution of any refund would be hopelessly delayed.[1] In view of the FCC's propensities and its concept that consuming more than 7½ years in the disposition of a rate proceeding constitutes compliance with the statutory mandate that such proceedings be handled "as speedily as possible," (47 USCA, § 204) petitioners despair of any hope that, if the Government's proposal is adopted, these proceedings will ever be terminated without drastic action of this Court or that any refund will be distributed, regardless of the ultimate outcome on the merits.

Petitioners would, for the reasons set forth above, suffer irreparable damage if this Court were to adopt the Government's proposal. For the Government to deny this is to turn away from any thoughtful consideration of the problems inherent in the review by appellate courts of rate orders of administrative agencies.

Petitioners submit that these considerations are impelling reasons for rejection of the Government proposal.

The only other solutions with any semblance of equity and simplicity are (i) an interlocutory injunction limited in scope as initially requested by petitioners, or (ii) an interlocutory injunction of the FCC orders in their entirety as adopted by this Court.

The considerations which led petitioners to limit the scope of the injunction initially requested were merely that it was a method by which they could avoid irreparable damage, which could not cause injury to any customer and would

[1] The unlikelihood of securing any such consent from the carriers perhaps explains the FCC's guarded statements that "T&T and Western Union have 'consented in principle' and that "AT&T has stated that its agreement does not extend to retroactive effect." It may also explain why the FCC failed to furnish a form of order with its additional pleading.

have minimal effects on the carriers. Under the limited interloctory injunction proposal, the Government as a customer would have secured all of the reductions in rates to which the Government now claims it is entitled.

Petitioners' initial request for a limited injunction was objected to by AT&T and Western Union[2] solely on the ground that granting a stay of the FCC orders to these three customers would constitute an extension of the undue discrimination resulting from the stay granted to news agencies by FCC. Petitioners submit that this argument, which is truly superficial, overlooks the simplicity and the absence of any unfair effect of a limited injunction.

For all of the foregoing reasons, petitioners submit that an interlocutory injunction, limited in scope as initially requested by petitioners, affords a simple, fair and reasonable solution in the circumstances of this appeal. Petitioners also submit that any reconsideration by the Court of its September 27, 1963 order granting the injunction of the FCC orders in their entirety should include consideration of this avenue of approach.

Nevertheless, petitioners were ready, and will continue, to accept and support the alternative proposal, suggested initially by AT&T and adopted by the Court, of enjoining the FCC orders in their entirety. In petitioners' view this approach is not only proper, it is the most equitable for the greatest number of customers and other interested parties.

The interloctory injunction of the FCC orders in their entirety seems the fairest solution because

[2] This proposal would have had almost no effect on Western Union since only one of the forty-two private lines leased by petitioners is provided by Western Union.

(a) it provides a means for the carriers to balance the countereffects of the prescribed increases and decreases in charges;

(b) it maintains the *status quo* pending appeal which is a normal procedure in contested litigation involving irreparable damage to some interested parties;

(c) it provides protection for the large number of customers who would be adversely affected by increases in charges (the receipt by petitioners and their counsel of numerous inquiries and expressions of support from such affected customers not before this Court substantiates this consideration); and

(d) it cannot prejudice telegraph grade customers who, in the absence of the injunction, would benefit from reduced charges under the rates prescribed by the FCC orders. The absence of any prejudice arises from the terms under which the interim telegraph rates were placed into effect (and would continue in effect under the injunction) which would permit such customers to obtain refunds of the excess charges paid if petitioners' appeal were unsuccessful.

One of the grounds urged by the Government to justify its refund proposal is that "since petitioners have already requested a sixty-day extension of time to file their brief, it appears that the case may take some time to resolve". The allegation is completely without substance. It ignores the fact that petitioners have offered to withdraw their motion for extension of time and to file their brief and appendix within 30 days after the FCC files the required supplemental record.[1] The request for such supplemental record was filed more than two weeks ago. The omitted items required were precisely identified. The FCC has conceded such items were omitted, because they were "overlooked", and agreed to supply at least some of them "as soon as practicable".

Ignoring these facts, and petitioners' Emergency Motion as well, the FCC has failed to file a single item as of this date.

Under these circumstances, the FCC alone must bear the burden of delay. If it would promptly perform its responsibilities as a party to this appeal, and if the FCC and other parties file their briefs in the time allowed by the Court's Rules, this appeal can be heard on the merits within two or three months. If the FCC will only stop its quarreling on the fringes and permit the case to be considered on its merits, the Court can dispose of the problem in January, 1964.

Accordingly, petitioners urge the Court to reject the Government's additional pleading, reaffirm its prior order issuing the interlocutory injunction and direct the FCC to file the supplemental record forthwith.

Respectfully submitted,

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February 12, 1964